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No. 15-537

In the Supreme Court of the United States

JUAN BRAVO-FERNANDEZ AND HECTOR MARTINEZ-MALDONADO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, under the collateral estoppel component of the Double Jeopardy Clause, the jury's acquittal of petitioners on some counts bars the government from retrying petitioners on another count on which the same jury convicted petitioners, when that conviction was subsequently vacated for legal error and the jury's verdict in the first trial was inconsistent.

2. Whether a district court docket entry line order purporting to memorialize the court of appeals' judgment and erroneously stating that the court of appeals had acquitted petitioners on counts that the court had in fact vacated constitutes an acquittal by the district court precluding retrial under the Double Jeopardy Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 790 F.3d 41. The memorandum and order of the district court (Pet. App. 41a-53a) is reported at 988 F. Supp. 2d 191. A separate order of the district court (Pet. App. 54a-58a) is unreported. A prior opinion of the court of appeals (Pet. App. 59a-133a) is reported at 722 F.3d 1.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 2015. A petition for rehearing was denied on July 27, 2015 (Pet. App. 134a-135a). The petition for a writ of certiorari was filed on October 23, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of, *inter alia*, federal program bribery, in violation of 18 U.S.C. 666. Petitioners were sentenced to 48 months of imprisonment, to be followed by three years of supervised release. Bravo-Fernandez Judgment 1-3; Martínez-Maldonado Judgment 1-3. As relevant here, the court of appeals vacated petitioners' bribery convictions on grounds of instructional error and remanded for further proceedings. Pet. App. 59a-133a. On remand, before retrial, the district court denied two separate motions by petitioners for acquittals on the bribery charges under the Double Jeopardy Clause. *Id.* at 41a-53a, 54a-58a. The court of appeals affirmed. *Id.* at 1a-40a.

1. From January 2005 until early 2011, petitioner Hector Martínez-Maldonado was a senator for the Commonwealth of Puerto Rico. Pet. App. 61a. Petitioner Juan Bravo-Fernandez was the president of Ranger American, a private security firm in Puerto Rico that provided services such as armored car transportation and security guard staffing. *Ibid.*

In early 2005, Bravo-Fernandez began advocating for the passage of legislation related to the security industry in Puerto Rico. Pet. App. 61a. The two bills he supported—Senate Project 410 (SP 410) and Senate Project 471 (SP 471)—"would have provided substantial financial benefits" to Bravo-Fernandez and his firm. *Ibid.*

At that time, Martínez-Maldonado was chairman of the Senate's Public Safety Committee, which had jurisdiction over the two bills. Pet. App. 61a-62a. Martínez-Maldonado "was in a position to exercise a

measure of control over the introduction and progression of the bills through the Committee and the Senate." *Ibid.* Another senator, Jorge de Castro Font, was chairman of the Senate's Rules and Calendars Committee, which exercised control over which bills were brought to a vote and when. Gov't C.A. Br. 7.

On March 2, 2005, Bravo-Fernandez purchased several tickets for $1000 each to attend a professional boxing match between the popular Puerto Rican boxer Félix "Tito" Trinidad and Ronald Lamont "Winky" Wright, which was scheduled to occur in Las Vegas in May 2005. Pet. App. 62a. That same day, Martínez-Maldonado, as chairman of the Public Safety Committee, submitted SP 410 for consideration by the Senate. *Id.* at 61a-62a.

On April 20, 2005, Martínez-Maldonado presided over a Public Safety Committee hearing on SP 471, at which Bravo-Fernandez testified. Pet. App. 62a. The next day, Bravo-Fernandez reserved a hotel room at the Mandalay Bay Hotel in Las Vegas. *Ibid.* Bravo-Fernandez also arranged first-class airline tickets for himself, Martínez-Maldonado, and de Castro Font from Puerto Rico to Las Vegas. *Ibid.* On May 11, 2005, Martínez-Maldonado issued a Committee report in support of SP 471. *Ibid.*

On May 13, 2015, the day before the fight, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font flew to Las Vegas. Gov't C.A. Br. 8. When they arrived, they checked in to the Mandalay Bay Hotel, where they stayed for two nights in separate rooms. Pet. App. 62a. Bravo-Fernandez paid for Martínez-Maldonado's room the first night. *Ibid.* The three men, joined by de Castro Font's assistant, went out to dinner the first night, with Bravo-Fernandez paying

the $495 bill. *Ibid.* The second night, Bravo-Fernandez, Martínez-Maldonado, and de Castro Font attended the boxing match, sitting in the $1000 seats purchased by Bravo-Fernandez. *Ibid.*

On May 15, 2005, the three men flew from Las Vegas to Miami, where they stayed at the Marriott South Beach in individual rooms that Bravo-Fernandez paid for, at a total cost of $954.75. Pet. App. 63a. On May 16, 2005, they returned to Puerto Rico. *Ibid.*

On May 17, 2005, de Castro Font scheduled an immediate Senate floor vote on SP 471. Pet. App. 63a. Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.* The next day, Martínez-Maldonado issued a Committee report supporting SP 410. *Ibid.* On May 23, 2005, de Castro Font scheduled an immediate floor vote on SP 410. *Ibid.* Again, Martínez-Maldonado and de Castro Font both voted in favor of the bill. *Ibid.*

2. On June 22, 2010, a federal grand jury in the United States District Court for the District of Puerto Rico returned an indictment charging petitioners with various bribery-related offenses. Pet. App. 3a. Following a jury trial, petitioners were convicted of federal program bribery, in violation of 18 U.S.C. 666. Pet. App. 4a. The jury acquitted petitioners of conspiring to violate Section 666 and of violating the Travel Act, 18 U.S.C. 1952, in furtherance of violating Section 666. Pet. App. 4a.[1] The district court sen-

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[1] Bravo-Fernandez was additionally convicted of conspiracy to travel in interstate commerce in aid of racketeering and violating the Travel Act with the intent to promote bribery in violation of Puerto Rico law. Pet. App. 4a, 64a. Martínez-Maldonado was additionally convicted of conspiracy, but the jury "checked 'No' as to each potential object of the conspiracy." *Id.* at 64a. Following

tenced each petitioner to 48 months of imprisonment. *Id.* at 64a.

3. The court of appeals vacated petitioners' federal program bribery convictions, holding that the jury instructions had erroneously permitted the jury to find petitioners "guilty of offering and receiving a gratuity, rather than a bribe." Pet. App. 81a; see *id.* at 105a. As a matter of first impression, the court held that Section 666 criminalizes only bribes, and not gratuities. *Id.* at 91a-103a. The jury instructions were flawed, the court concluded, because they stated that the government did not need to prove that an agreement to offer or accept a thing of value was made before the recipient took official action, and thus permitted a finding of guilt based on a reward for a completed act, rather than on payment of a quid pro quo bribe. *Id.* at 82a-90a.

The court of appeals specifically noted that the evidence at trial supported a finding of guilt on both a bribery theory and a gratuity theory. Pet. App. 90a; see *id.* at 5a. Because the court could not say with certainty that the jury did not rely on a gratuity theory, it vacated petitioners' Section 666 convictions and

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the jury verdict, the district court granted Bravo-Fernandez's motion for a judgment of acquittal on the Travel Act count because the Puerto Rico bribery statutes that provided the predicate for the violation were repealed before the travel took place. *Ibid.* The court also initially dismissed Martínez-Maldonado's conspiracy conviction in light of the jury's failure to specify an object of the conspiracy, but the court then reinstated the conviction and later declared a mistrial and dismissed the count without prejudice. *Ibid.*

remanded for further proceedings. *Id.* at 104a-105a, 130a.[2]

4. The case returned to the district court for a possible retrial of petitioners on the federal program bribery charges. See Pet. App. 2a (observing that the court of appeals had "remanded for a possible new trial based on a proper theory of liability under [Section] 666."); *id.* at 108a (noting that the government could "not pursue a conviction on [a gratuity theory] if [petitioners] [we]re retried").

a. Immediately after the court of appeals' mandate issued and before any retrial, the district court issued a line order on the docket purporting to memorialize the court of appeals' judgments, stating: "[I]n accordance with the Judgments of the Court of Appeals (Docket Nos. 639 and 640), a judgment of acquittal shall be entered as to [Martínez-Maldonado's] conspiracy count, as to [Bravo-Fernandez's] conspiracy conviction, and as to both [petitioners'] section 666 convictions." Pet. App. 6a. The last portion of the docket entry was erroneous, as the court of appeals

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[2] The court of appeals also reversed Bravo-Fernandez's conspiracy conviction, holding that he could not be found guilty of conspiring to travel in interstate commerce to further a violation of Puerto Rico bribery laws because those laws had been repealed before the travel occurred. Pet. App. 108a-120a. In addition, the court reversed the district court's declaration of a mistrial and dismissal of Martínez-Maldonado's conspiracy charge without prejudice and directed the district court to enter a judgment of acquittal on that count. *Id.* at 120a-130a. The court of appeals concluded that the district court's initial dismissal of the conspiracy conviction constituted an acquittal because the district court made a determination that the government had failed to prove its case. *Id.* at 127a-130a. The court of appeals' rulings on the conspiracy convictions are not at issue here.

had vacated, not reversed, the Section 666 convictions. See *ibid.* (noting that "all parties to this appeal agree" that the line order was "mistaken"). Less than three hours later, following a motion to clarify by the government, the district court vacated the erroneous docket entry and directed the clerk to "enter a Judgment of Acquit[t]al only as to [Martínez-Maldonado's] and [Bravo-Fernandez's] conspiracy counts. The [petitioners'] section 666 convictions are VACATED." *Id.* at 55a (citation and internal quotation marks omitted).

Petitioners subsequently moved for "reinstatement" of the district court's "acquittal" on the Section 666 counts. Pet. App. 55a. The court denied the motion. *Id.* at 54a-58a. The court "flatly reject[ed]" petitioners' argument that the docket entry qualified as an acquittal that the court lacked authority to correct. *Id.* at 56a. The court stated that it had engaged in no factual assessments or legal determinations in issuing the order and that it had "merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, not to issue an acquittal *sua sponte* without any kind of analysis." *Id.* at 57a. The language "deeming [petitioners'] section 666 counts 'acquitted' instead of 'vacated'" was "an error of transcription, not an error of law." *Id.* at 56a. Because the docket entry was not a resolution of petitioners' criminal culpability, but rather was simply "a straightforward technical error arising from oversight," petitioners were not entitled to judgments of acquittal based on the line order. *Id.* at 58a (internal quotation marks omitted).

b. Petitioners separately moved for judgments of acquittal on the federal program bribery charges un-

der the Double Jeopardy Clause, arguing that collateral estoppel precluded retrial on those charges because, in petitioners' view, the jury had necessarily rejected a bribery theory when it acquitted them of conspiring to violate Section 666 and of violating the Travel Act in furtherance of violating Section 666. Pet. App. 41a-42a.

The district court denied the motion. Pet. App. 41a-53a. The court observed that the jury had convicted petitioners of standalone federal program bribery, and thus "necessarily * * * found all elements of section 666 federal program bribery to be proven beyond a reasonable doubt." *Id.* at 44a. Although the court of appeals had vacated those convictions for legal error, the district court observed that the convictions were nevertheless a relevant part of the record when "determin[ing] what the jury necessarily decided" for purposes of applying collateral estoppel. *Id.* at 44a n.2.

The district court acknowledged that the Section 666 convictions were difficult to reconcile with the jury's decision to acquit petitioners of conspiring to violate Section 666 and of violating the Travel Act in furtherance of a Section 666 violation. See Pet. App. 47a-49a. But considering the convictions and acquittals together, the court could not conclude that the jury rejected a bribery theory of guilt; rather, the court explained that it was possible that "the jury acted irrationally and the verdict simply was inconsistent." *Id.* at 48a. "Once a jury reaches inconsistent results," the court observed, "'principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict—are no longer useful.'" *Id.* at

49a (quoting *United States* v. *Powell*, 469 U.S. 57, 68 (1984)). Thus, because petitioners had failed to meet their burden of showing that the "jury necessarily decided the issue of bribery in [their] favor," the court concluded that "preclusive effect must be denied." *Id.* at 53a.

5. The court of appeals unanimously affirmed, rejecting petitioners' double jeopardy arguments. Pet. App. 1a-40a.

a. The court of appeals first held that the collateral estoppel component of the Double Jeopardy Clause did not bar the government from retrying petitioners on the Section 666 counts. Pet. App. 7a-36a. The court recognized that, under this Court's decision in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), an issue of fact that has necessarily been decided in the defendant's favor in a prior trial may not be relitigated. Pet. App. 8a. To determine whether "a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration," the court of appeals noted that it "must 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter.'" *Ibid.* (brackets in original) (quoting *Ashe*, 397 U.S. at 444). The court further observed that this Court adopted an "important limitation" on the application of collateral estoppel in *United States* v. *Powell*, *supra*, which held that a jury's acquittal could not invalidate an "inconsistent conviction that was rendered by the same jury in the same proceeding." Pet. App. 10a-11a. "In such a case," the court of appeals explained, "there is no way to know without speculating which of the inconsistent verdicts—the acquittal or the conviction—the jury really meant,"

and so collateral estoppel principles "are impossible to apply." *Id.* at 11a (citation and internal quotation marks omitted).

Applying *Ashe* and *Powell*, the court of appeals rejected petitioners' collateral estoppel argument. The court held that the inconsistent verdicts, which found petitioners guilty of a standalone Section 666 offense but not guilty of offenses that involved a Section 666 violation as a predicate, made it impossible to determine whether the jury necessarily decided that petitioners had not committed bribery. Pet. App. 15a-36a. The court disagreed with petitioners' argument that, because the Section 666 convictions had been vacated for legal error, they could not be considered in determining what the jury actually decided. *Id.* at 15a-20a. *Ashe*, the court noted, "instructed that, for purposes of determining the collateral estoppel effect of acquittals, [courts] must undertake a 'practical' analysis based on the 'record' of the prior proceeding, and with 'an eye to all the circumstances of the proceedings.'" *Id.* at 16a (quoting *Ashe*, 397 U.S. at 444) (citation and internal quotation marks omitted). "Like the acquittals on which [petitioners] rely," the court reasoned, "the convictions in this case are part of what the jury decided at trial." *Ibid.* "Thus, for purposes of deciding whether the jury necessarily decided that the government failed to prove that [petitioners] violated [Section] 666," the court observed, "the fact [that] the jury also convicted [petitioners] of violating [Section] 666 would seem to be of quite obvious relevance, even though the convictions were later vacated." *Id.* at 17a.

The court of appeals also rejected petitioners' effort to analogize vacated convictions to counts on which a jury has hung, which are not a relevant part of

the record for purposes of applying collateral estoppel under this Court's decision in *Yeager* v. *United States*, 557 U.S. 110 (2009). Pet. App. 17a. *Yeager* observed that a hung count "represents not 'a jury's decision[]' but only 'its failure[] to decide.'" *Id.* at 18a (brackets in original) (quoting *Yeager*, 557 U.S. at 122). The court of appeals noted that, under that "line of reasoning in *Yeager*[,] * * * vacated counts should be treated differently from hung counts" because "vacated convictions, unlike hung counts, *are* jury decisions, through which the jury *has* spoken." *Ibid.* The court therefore "conclude[d] that vacated convictions, unlike hung counts, are relevant to the *Ashe* inquiry into what a jury necessarily decided when acquitting on counts related to the vacated convictions." *Id.* at 19a. Because the Section 666 convictions in petitioners' prior trial were inconsistent with the jury's acquittals on the related charges involving Section 666 as a predicate, the court held that petitioners could not "meet their burden of showing that the acquittals * * * collaterally estop the renewed, standalone [Section] 666 prosecutions." *Id.* at 25a.[3]

b. The court of appeals also held that the district court's erroneous line order did not constitute acquittals on the Section 666 charges that would preclude a renewed prosecution on those counts. Pet. App. 37a-39a. The court of appeals acknowledged the "well-established rule that 'the Double Jeopardy Clause bars retrial following a court-decreed acquittal, even if the acquittal is based upon an egregiously erroneous

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[3] Petitioners argued in the court of appeals that the verdicts were not truly inconsistent. Pet. App. 20a. The court rejected that argument, *id.* at 20a-36a, and petitioners do not renew the claim here.

foundation.'" *Id.* at 37a (quoting *Evans* v. *Michigan*, 133 S. Ct. 1069, 1074 (2013)) (citation and internal quotation marks omitted). But the court further observed that "[w]hether an order counts as an 'acquittal' * * * is a question of substance and not of name." *Ibid.*

The court of appeals held that the line order, which was entered *sua sponte* by the district court immediately after the court of appeals' mandate issued, did "not amount to a substantive acquittal by the District Court." Pet. App. 38a. The court of appeals emphasized that nothing in the record indicated that the district court had evaluated the government's evidence in entering the line order; rather, the language of the order suggested that it was "merely intended as a ministerial act to carry out [the court of appeals'] instructions—whatever they may have been—and not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" *Ibid.* (quoting *Evans*, 133 S. Ct. at 1077). The court added that the district court had confirmed that the order was simply a transcription error, *ibid.*, and the circumstances surrounding the entry of the order were "consistent with [that] characterization," *id.* at 39a. Accordingly, the court of appeals concluded that the "line order did not constitute an acquittal under the Double Jeopardy Clause." *Ibid.*

ARGUMENT

Petitioners renew their claims (Pet. 14-20, 24-26) that their retrial on standalone Section 666 charges is precluded by the collateral estoppel component of the Double Jeopardy Clause and by the district court's erroneous line order. Petitioners further assert (Pet. 10-13) that the lower courts are divided on the ques-

tion whether a vacated conviction that was rendered in an inconsistent verdict is a relevant part of the record for purposes of applying collateral estoppel. The court of appeals correctly concluded that double jeopardy principles do not bar retrial of petitioners on the Section 666 counts. And although one state high court has declined to consider vacated convictions in a collateral estoppel analysis, the limited division on that issue does not warrant this Court's intervention.

1. Petitioners are incorrect to contend (Pet. 9-24) that the jury's guilty verdicts on the Section 666 charges must be disregarded in determining the collateral estoppel effect of acquittals rendered in the same proceeding. This Court's review of that issue is not warranted.

a. In *Ashe* v. *Swenson*, 397 U.S. 436 (1970), this Court held that the Double Jeopardy Clause "embodie[s]" the doctrine of collateral estoppel, which bars a prosecution that would require the relitigation of ultimate factual issues that were resolved against the government in an earlier prosecution. *Id.* at 445. A jury's acquittal of a defendant on one charge precludes the government from proceeding against him on a second charge, however, only if the jury necessarily found a fact in the defendant's favor that is an essential element of the second charge. See *id.* at 443-445. To determine what a jury has necessarily decided, "courts should 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.'" *Yeager* v. *United States*, 557 U.S. 110, 119-120 (2009) (quoting

Ashe, 397 U.S. at 444). "[T]he inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.'" *Id.* at 120 (quoting *Ashe*, 397 U.S. at 444) (citation omitted). "[T]he rule of collateral estoppel in criminal cases," the Court has observed, must be applied with "realism and rationality." *Ashe*, 397 U.S. at 444.

This Court has emphasized that the application of collateral estoppel is "predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict." *United States* v. *Powell*, 469 U.S. 57, 68 (1984). When a jury reaches inconsistent verdicts, however, that assumption is not accurate, and the Court has accordingly observed that "principles of collateral estoppel * * * are no longer useful." *Ibid.* The problem, the Court has explained, is that "it is unclear whose ox has been gored"—and therefore impossible to determine what the jury necessarily decided. *Id.* at 65. For example, the jury might have been "convinced of guilt" on the count on which it convicted, "and then through mistake, compromise, or lenity, arrived at an inconsistent conclusion on the lesser offense." *Ibid.* "[W]here truly inconsistent verdicts have been reached, '[t]he most that can be said . . . is that the verdict shows that either in the acquittal or the conviction the jury did not speak their real conclusions, but that does not show that they were not convinced of the defendant's guilt.'" *Id.* at 64-65 (second set of brackets in original) (quoting *Dunn* v. *United States*, 284 U.S. 390, 393 (1932)). Thus, because any determination of which verdict "the jury 'really meant'" would require "pure speculation," *id.* at 66, 68, a defendant cannot carry his burden of establishing that "the issue whose relitigation he

seeks to foreclose was actually decided" in his favor "in the first proceeding." *Dowling* v. *United States*, 493 U.S. 342, 350 (1990).

b. Applying those principles here, the court of appeals correctly held that, because the jury's verdict in the first trial was inconsistent, petitioners cannot invoke collateral estoppel to bar retrial on the vacated Section 666 convictions. Petitioners cannot show that the acquittals in the prior trial necessarily represented a finding that they were not guilty beyond a reasonable doubt of bribery because the jury in fact *convicted* them of a standalone Section 666 violation. Petitioners' argument "necessarily assumes that the acquittal[s] on the predicate offense w[ere] proper—the one[s] the jury 'really meant,'" but, as *Powell* explained, it is "equally possible" that the jury was convinced that petitioners were guilty of bribery in violation of Section 666 and acquitted on the related charges "through mistake, compromise, or lenity." 469 U.S. at 65, 68. In light of the inconsistent verdict, it is impossible to know what the jury actually decided, and "principles of collateral estoppel—which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict"—therefore "are no longer useful." *Id.* at 68.

Petitioners do not dispute in this Court that the jury verdict in their first trial was inconsistent, but they nevertheless argue (Pet. 15-20) that the court of appeals should have disregarded the convictions on the Section 666 charges because those convictions were vacated on appeal because of legal error. Petitioners maintain that a vacated conviction is a "nonevent" that should not be considered in determining what the jury necessarily decided for purposes of applying collateral

estoppel. Pet. 14 (citation omitted).[4] But that argument overlooks this Court's observation that "reversal for trial error, as distinguished from evidentiary insufficiency, does not constitute a decision to the effect that the government has failed to prove its case." *Burks* v. *United States*, 437 U.S. 1, 15 (1978). A vacated conviction is nullified in the sense that it may not be used to impose legal disabilities, but vacatur does not "erase the fact of the conviction" from the prior proceedings. *United States* v. *Crowell*, 374 F.3d 790, 792 (9th Cir. 2004), cert. denied, 543 U.S. 1070 (2005). A court conducting the "practical" inquiry adopted in *Ashe*, which focuses on "realism and rationality" and requires examination of "all the circumstances of the proceedings," 397 U.S. at 444, therefore need not shut its eyes to a conviction that demonstrates that the jury was not acting rationally when it rendered an inconsistent verdict. In short, petitioners cannot show that the jury's determination that they were guilty beyond a reasonable doubt of a Section 666 offense is irrelevant to discerning whether the jury necessarily decided that petitioners could *not* be found guilty of that offense, even though the Section

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[4] Petitioners deem it significant that a vacated conviction is "deprived of its conclusive effect as collateral estoppel." Pet. 18 (citation omitted). But that is beside the point because the government is not seeking to rely on the jury's convictions on the Section 666 counts to collaterally estop petitioners from proving a fact in future litigation. Rather, petitioners are attempting to rely on the *acquittals* to collaterally estop retrial for a Section 666 offense. The Section 666 convictions are relevant not because they should be given preclusive effect, but because they show the acquittals should *not* be accorded that effect in light of the jury's inconsistent verdict.

666 convictions were subsequently vacated for instructional error.[5]

Petitioners also contend (Pet. 14-17) that the court of appeals' decision is inconsistent with *Yeager*, which held that "the consideration of hung counts has no place in the issue-preclusion analysis." 557 U.S. at 122. *Yeager* reached that conclusion, however, by reasoning that "a jury speaks only through its verdict," such that a "failure to reach a verdict cannot—by negative implication—yield a piece of information that helps put together the trial puzzle." *Id.* at 121. No such negative implication is required when a jury chooses to *convict*, as it did here on the standalone Section 666 offenses. As *Yeager* itself emphasized, hung counts "are not similar to jury verdicts in any relevant sense." *Id.* at 124; see *id.* at 125 ("[T]he fact that a jury hangs is evidence of nothing—other than, of course, that it has failed to decide anything.") Indeed, *Yeager* supports the court of appeals' decision to consider petitioners' convictions in the collateral estoppel analysis, as *Yeager* directed that "courts should

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[5] Petitioners appear to suggest (Pet. 15) that a conviction that is vacated based on instructional error should be treated differently in the collateral estoppel analysis than convictions that are vacated for other legal errors. That claim lacks merit in this context. Here, the jury was properly instructed on a bribery theory, and the court of appeals found that the evidence at trial supported a finding of guilt on that theory. Pet. App. 5a, 90a, 104a. The jury instructions were erroneous not because they incorrectly described the elements of a bribery offense, but because they also permitted conviction based on a gratuity theory. Although petitioners argued below that the Section 666 convictions should be interpreted to rest on the gratuity theory rather than the bribery theory, the court rejected that claim, *id.* at 20a-36a, and petitioners do not renew it here.

scrutinize a jury's decisions, not its failures to decide" in order "[t]o identify what a jury necessarily determined at trial." *Id.* at 122. Petitioners accordingly cannot establish that the jury's decision to convict them of a Section 666 offense is irrelevant based on *Yeager*.[6]

c. Petitioners contend (Pet. 10-13) that lower courts have divided on the question whether a vacated conviction may be considered when applying the collateral estoppel component of the Double Jeopardy Clause. But the limited division petitioners identify does not warrant this Court's review.

As petitioners correctly observe (Pet. 13), all federal courts of appeals to have considered the question, as well as two state high courts, have held in agreement with the First Circuit that a conviction that is vacated based on legal error may be considered in the collateral estoppel inquiry. See *United States* v. *Bruno*, 531 Fed. Appx. 47, 49 (2d Cir. 2013); *United States* v. *Citron*, 853 F.2d 1055, 1058-1060 (2d Cir. 1988); *United States* v. *Price*, 750 F.2d 363, 365-366 (5th Cir.), cert. denied, 473 U.S. 904 (1985); *State* v. *Kelly*, 992 A.2d 776, 778-779, 783, 786 (N.J. 2010); *Evans* v. *United States*, 987 A.2d 1138, 1141-1142 (D.C. 2010),

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[6] Petitioners maintain (Pet. 16) that, under *Yeager*, the finality of the jury's acquittals on charges involving Section 666 as a predicate is "the decisive issue." There is of course no doubt that those acquittals are final and petitioners cannot be retried on those charges. The question here, however, is whether those acquittals necessarily demonstrate that the jury resolved an issue of fact in petitioners' favor that would preclude retrial on the standalone Section 666 charges. The answer to that question is "no," because the acquittals were inconsistent with the Section 666 convictions and the jury's irrational verdict makes "principles of collateral estoppel * * * no longer useful." *Powell*, 469 U.S. at 68.

cert. denied, 562 U.S. 1202 (2011). In reaching that conclusion, the courts have rejected the claim that vacated convictions should be treated the same way as hung counts, so as to come within the analysis adopted in *Yeager*. See *Bruno*, 531 Fed. Appx. at 49; *Citron*, 853 F.2d at 1059; *Price*, 750 F.2d at 365; *Evans*, 987 A.2d at 1142.[7]

The Michigan Supreme Court, in a divided opinion, has reached the opposite conclusion, holding that a vacated conviction cannot "defeat the preclusive effect of an acquittal." *People* v. *Wilson*, 852 N.W.2d 134, 141 (2014). That single outlying decision by a state court does not warrant this Court's intervention—particularly given that the division is shallow and of recent origin.

Petitioners are wrong to contend (Pet. 11-12) that the court of appeals' decision also conflicts with decisions from the New Mexico and Iowa Supreme Courts. Neither decision cited *Yeager* or adopted the principle on which petitioners rely, and one of them turned critically on a holding of state law.

In *State* v. *Montoya*, 306 P.3d 426 (N.M. 2013), a jury convicted the defendant of felony murder but also "effectively acquitted" him of second-degree murder when finding him guilty of the lesser offense of voluntary manslaughter. *Id.* at 429, 432. Both felony murder and second-degree murder included as an element the absence of sufficient provocation for the murder, but the judge had erroneously failed to instruct the

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[7] Although the decisions in *Citron* and *Price* both predate *Yeager*, the Second and Fifth Circuits in those cases decided that vacated counts could be considered in the collateral estoppel analysis at a time when those circuits had already held that hung counts must be disregarded. See Pet. App. 19a n.7.

jury on that element with respect to the felony-murder charge. *Id.* at 429-431. The New Mexico Supreme Court held that the felony murder conviction accordingly must be vacated for instructional error. *Id.* at 431, 440. Because the jury had convicted the defendant of voluntary manslaughter as a lesser-included offense of second-degree murder, however, the jury had already determined that there *was* sufficient provocation for the murder. See *id.* at 430 (observing that "[a] heat-of-passion intentional killing" is punishable as voluntary manslaughter under New Mexico law). The court thus held that collateral estoppel barred retrial on the felony murder charge because a proper instruction would require the jury to find a lack of sufficient provocation, and that issue had already been resolved in the defendant's favor when the jury acquitted him of second-degree murder. *Id.* at 432.

Petitioners erroneously state (Pet. 11) that "the acquittal" in *Montoya* "was by definition inconsistent with the initial, vacated conviction for felony murder." In fact, because the jury had been improperly instructed on the elements of felony murder, that conviction was not inconsistent with the acquittal on second-degree murder: the jurors had found sufficient provocation to foreclose a second-degree murder conviction, but they had not been informed that the lack of sufficient provocation was also an element of felony murder and thus had not rejected such a finding in convicting on felony murder.[8] The analysis in

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[8] Unlike in *Montoya*, the instructional error in this case did not mean that the jury's verdict was consistent under the instructions the jury received. As previously noted, see note 5, *supra*, the jury at petitioners' trial was properly instructed on a bribery theory of

Montoya therefore did not involve an inconsistent verdict. Accordingly, it does not conflict with the court of appeals' decision in this case that a vacated conviction that is inconsistent with an acquittal may be considered in the collateral estoppel analysis.

The Iowa Supreme Court's decision in *State* v. *Halstead*, 791 N.W.2d 805 (2010), likewise is inapposite. The court there, as a matter of *state* law, "decline[d] to follow" this Court's decision in *Powell* and held that "in a case involving conviction of a compound felony when the defendant is acquitted of the underlying predicate crime, the conviction cannot stand." *Id.* at 814. The court reasoned that an inconsistent guilty verdict on a compound offense must essentially be treated as an acquittal. See *id.* at 815 (observing that "a jury verdict involving compound inconsistency insults the basic due process requirement that guilt must be proved beyond a reasonable doubt"). Having held that an inconsistent conviction on a compound offense must be set aside as "inconsistent with the notion of guilt beyond a reasonable doubt," *ibid.*, the court further held that retrial on the compound offense would violate the Double Jeopardy Clause, *id.* at 816. Contrary to petitioners' assertion (Pet. 12 n.1), *Halstead*'s double jeopardy analysis cannot be divorced from its holding that, under state law, an inconsistent guilty verdict on a compound offense should effectively be interpreted as a jury finding that the defendant was not guilty beyond a reasonable doubt.

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guilt and the evidence at trial supported a conviction on that theory. Petitioners accordingly do not argue in their petition for a writ of certiorari that the verdict was consistent.

Halstead accordingly does not conflict with the court of appeals' decision in this case.[9]

d. This Court's review is also unwarranted because the question here—whether a vacated conviction that was inconsistent with an acquittal can be considered for purposes of applying collateral estoppel—arises extremely infrequently. Only three courts of appeals and three state high courts have had an opportunity to consider the question in the 35-plus years since *Ashe* held that the Double Jeopardy Clause embodies a collateral estoppel component. The government is aware of only two occasions other than this one in the last three decades in which this Court has been asked to resolve the question presented here. The Court denied review in both of those cases. See *Evans* v. *United States*, 562 U.S. 1202 (2011) (No. 10-6753); *Price* v. *United States*, 473 U.S. 904 (1985) (No. 84-1444). There is no reason for a different result here.

Petitioners contend (Pet. 22) that the court of appeals' decision in this case "will encourage prosecutors simultaneously to overcharge and to push for far-reaching interpretations of criminal statutes." But petitioners cite no evidence that prosecutors in the Second and Fifth Circuits routinely bring unwarranted charges or urge unwarranted interpretations of criminal statutes, even though those courts adopted

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[9] Tellingly, the court of appeals below did not consider *Montoya* and *Halstead* relevant to the question whether a vacated conviction that was inconsistent with an acquittal may be considered for purposes of applying collateral estoppel. See Pet. App. 19a-20a (citing only the Michigan Supreme Court's decision as being in conflict with the court's analysis). And while petitioners cite (Pet. 2) *Montoya* and *Halstead* as evidence that the lower courts are "hopelessly divided" on the status of vacated counts in light of *Yeager*, neither of those decisions cites or discusses *Yeager*.

the rule more than 25 years ago that vacated convictions may be considered in the collateral estoppel analysis. Contrary to petitioners' suggestion, prosecutors in those jurisdictions and throughout the country generally offer reasonable interpretations of criminal statutes in reasonably compact indictments. See, *e.g.*, *Bates* v. *United States*, 522 U.S. 23, 32-33 (1997) (unanimously upholding the government's interpretation of 20 U.S.C. 1097(a)). Petitioners cite (Pet. 21) a handful of cases from the last 16 years that they contend involved "expansive" theories of criminal statutes offered by the government, but that is hardly a significant statistical showing given that about 60,000 criminal cases are filed in federal district court each year. See United States Courts, *Statistical Tables for the Federal Judiciary-June 2015, Criminal Cases Filed, Terminated, and Pending (Including Transfers), Tbl. D. Cases* (June 30, 2015), http://www.uscourts.gov/statistics-reports/statistical-tables-federal-judiciary-june-2015. Petitioners' concern about overcharging provides no basis for this Court's review.

2. Petitioners are also wrong to contend (Pet. 24-26) that the district court's erroneous docket entry line order constituted an acquittal that prevents retrial on the Section 666 charges. Review of that fact-bound claim is not warranted.

a. The court of appeals correctly concluded that the district court's transcription error in its line order was not an acquittal for double jeopardy purposes. This Court has repeatedly emphasized that "what constitutes an 'acquittal' is not to be controlled by the form of the judge's action," *United States* v. *Martin Linen Supply Co.*, 430 U.S. 564, 571 (1977), but rather turns on whether the "judicial determination[] * * *

go[es] to 'the criminal defendant's lack of criminal culpability,'" *Evans* v. *Michigan*, 133 S. Ct. 1069, 1077 (2013) (quoting *United States* v. *Scott*, 437 U.S. 82, 98 (1978)). The particular language used is not determinative; the word "acquittal," the Court has explained, "has no talismanic quality for purposes of the Double Jeopardy Clause." *Serfass* v. *United States*, 420 U.S. 377, 392 (1975). Thus, for example, "[i]f a trial court were to announce, midtrial, 'The defendant shall be acquitted because he was prejudiced by preindictment delay,' the Double Jeopardy Clause would pose no barrier to reprosecution, notwithstanding the 'acquittal' label." *Evans*, 133 S. Ct. at 1078. Rather, double jeopardy protections come into play only if the court has made a substantive ruling "that the prosecution's proof is insufficient to establish criminal liability for an offense"—for example, "'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'" *Id.* at 1075 (brackets in original) (quoting *Scott*, 437 U.S. at 91, 98 & n.11); see Pet. App. 37a ("Whether an order counts as an 'acquittal' * * * is a question of substance and not of name.").

The erroneous line order in this case did not reflect a resolution of the ultimate question of guilt or innocence, and it therefore does not qualify as an acquittal. The district court did not purport to evaluate the government's evidence or make any kind of determination of petitioners' criminal culpability; rather, the order was clearly "intended as a ministerial act to carry out th[e] [court of appeals'] instructions" in the

first appeal. Pet. App. 38a.[10] Notably, the district court expressly denied having engaged in any substantive analysis, instead explaining that the use of the word "acquittal" in the line order was "an error of transcription, not an error of law." *Id.* at 56a; see *id.* at 38a-39a; cf. *United States* v. *Weinstein*, 452 F.2d 704, 714 (2d Cir. 1971) (declining to "hold that the order here in question was a judgment of acquittal, which the judge repeatedly said he did not intend to enter"), cert. denied, 406 U.S. 917 (1972).[11] Moreover,

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[10] Indeed, the district court would have had no authority to make a substantive determination about the government's evidence in light of the court of appeals' mandate. In vacating the Section 666 convictions for legal error, the First Circuit found that the government had presented sufficient evidence to support a bribery theory, and it accordingly remanded the case for possible retrial on that theory. See Pet. App. 90a, 108a, 130a. The district court was presumably aware that it could not foreclose such a retrial by *sua sponte* granting an acquittal before the government presented any evidence in a second trial. See, *e.g.*, *United States* v. *Bruno*, 661 F.3d 733, 743 (2d Cir. 2011) (remand for retrial "allow[s] the government the opportunity to muster evidence sufficient to satisfy" a newly announced standard); *United States* v. *Wittig*, 575 F.3d 1085, 1102 (10th Cir. 2009) ("[Q]uestions about the sufficiency of the government's proof must await the new trial's results."). Thus, as the district court itself explained, the line order was "merely intended to transfer and apply the First Circuit Court of Appeals' mandate to the trial docket, and not to issue an acquittal *sua sponte* without any kind of analysis." Pet. App. 57a.

[11] Petitioners contend (Pet. 25-26) that the district court's line order "reflected [the court's] reading of the substantive determination in the first appeal." But the court disavowed that interpretation, instead characterizing the erroneous language as an "oversight." Pet. App. 56a. The court explained that it had meant to "implement the [court of appeals'] mandate," which had "unambiguously" ordered that the Section 666 convictions be vacated, not reversed based on a judgment of acquittal. *Id.* at 57a. In other

the "circumstances of the order—which came immediately after th[e] [court of appeals'] mandate, and unprompted by any party and thus not in response to an acquittal motion—[we]re consistent with the District Court's characterization of its line order." Pet. App. 39a. The court of appeals accordingly correctly held that "the line order does not amount to a substantive acquittal by the District Court under *Evans* and *Martin Linen*." *Id.* at 38a.[12]

b. Although petitioners refer (Pet. 26) to the need to provide "guidance for future cases," they point to no conflict among the lower courts on the question presented here—whether a line order erroneously purporting to memorialize a court of appeals' decision constitutes an irreversible acquittal simply because it mistakenly contained the word "acquittal." Petitioners' highly factbound argument on that issue lacks merit and does not warrant this Court's review.

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words, the district court did not attempt to put a substantive gloss on the court of appeals' decision, but merely committed a transcription error as it "transfer[ed]" the court of appeals' "mandate to the trial docket." *Ibid.*

[12] Petitioners contend (Pet. 24-26) that the court of appeals' analysis conflicts with *Evans*, which rejected the argument that an acquittal can occur "only if an actual element of the offense is resolved." 133 S. Ct. at 1077. But the facts of this case have nothing to do with that aspect of *Evans*. The court of appeals did not focus on whether the district court had failed to resolve a factual element of the offense, but rather found that no acquittal had occurred because "the line order was merely intended as a ministerial act" and "not an application of law to fact regarding [petitioners'] 'lack of criminal culpability.'" Pet. App. 38a (quoting *Evans*, 133 S. Ct. at 1077).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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